

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al.,	)	
	)	
Plaintiffs,	)	Civil No. 05-CV-0329 GKF-SAJ
	)	
v.	)	
	)	
Tyson Foods, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

**DEFENDANT CARGILL, INC.'S COUNTERCLAIM**

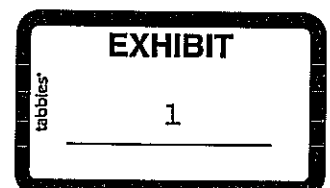
Separate Defendant Cargill, Inc. ("Cargill") hereby sets forth its counterclaim against Plaintiffs pursuant to Fed. R. Civ. P. 13.

1. Cargill incorporates as though restated herein its responses and denials to the allegations of Plaintiffs' Second Amended Complaint, and asserts this counterclaim without prejudice to its defenses and positions, among others, that (1) Cargill is not liable to Plaintiffs under CERCLA, 42 U.S.C. § 9607(a); (2) Plaintiffs are not entitled to an injunction against Cargill under RCRA, 28 U.S.C. § 6972; and (3) it is not liable to Plaintiffs in any respect.

**COUNT I  
CERCLA RESPONSE COSTS**

2. Plaintiffs allege that the entire Illinois River Watershed ("IRW"), the grower buildings, structures, installations and equipment, as well as the land to which "poultry waste" has been applied, constitute a "facility" as set forth in CERCLA, 42 U.S.C. § 9601(9). (Second Am. Compl. ¶¶ 21, 71, 80.)

3. Plaintiffs allege that constituents of "poultry waste," including but not limited to phosphorus and phosphorus compounds, nitrogen and nitrogen compounds, zinc and zinc



compounds, copper and copper compounds, and arsenic and arsenic compounds, constitute “hazardous substances” as set forth in CERCLA, 42 U.S.C. § 9601(14). (Second Am. Compl. ¶¶ 57, 73, 79.)

4. Plaintiffs allege that “releases” or “threatened releases” of the substances listed above in Paragraph 3 have occurred at or from the alleged “facility.” (Second Am. Compl. ¶¶ 21, 70-71, 79-80.)

5. Plaintiffs allege that Cargill is a “covered person” pursuant to 42 U.S.C. § 9607(a), by virtue of Cargill’s alleged role in the land application of poultry litter in the IRW (Second Am. Compl. ¶¶ 73-74, 82-83.), and on that basis assert that Cargill is jointly and severally liable for response costs and natural resource damages pursuant to 42 U.S.C. § 9607. (Second Am. Compl. ¶¶ 76, 88.)

6. Cargill has denied the foregoing allegations, including (but not limited to) the allegation that Cargill is jointly and severally liable for response costs and natural resource damages. Should the Court find, however, that the IRW or any portion thereof constitutes a CERCLA “facility,” that the substances listed above in Paragraph 3 above are “hazardous substances” as defined in CERCLA, and that “releases” or “threatened releases” of such substances have occurred, the following additional facts establish Plaintiffs’ liability to Cargill pursuant to 42 U.S.C. §§ 9607(a) and 9613(f).

7. Plaintiffs are “persons” as defined in 42 U.S.C. § 9601(21).

8. Plaintiffs own, control and/or operate properties within the IRW, including (but not limited to) Natural Falls State Park, Adair State Park, Cherokee Landing State Park, Tenkiller State Park, Northeastern State University, picnic areas, access areas, offices, storage facilities, and recreational facilities.

9. On information and belief, Plaintiffs have released materials onto the land, soil, groundwater or surface water at one or more of their properties within the IRW that contain one or more of the substances listed in Paragraph 3 above.

10. On information and belief, Plaintiffs own, manage, operate, and/or exercise control (sovereign and otherwise) over properties and equipment, including (but not limited to) septic systems and lagoons, within the IRW for the treatment and disposal of wastewater, including human waste.

11. On information and belief, one or more of the aforementioned wastewater treatment systems/facilities has released onto the land, soil, groundwater, or surface water of the IRW, one or more of the substances listed in Paragraph 3 above.

12. Further, Plaintiffs have directed, authorized, permitted and/or arranged for the release of one or more of the substances listed above in Paragraph 3 including (but not limited to) wastewater from publicly and privately owned treatment works, discharge from gravel mining, storm water, industrial waste water, and the land application of biosolids on the lands and into the waters of the IRW.

13. Accordingly, and subject to the conditions set forth in Paragraph 6 above, Plaintiffs constitute persons who are liable under 42 U.S.C. § 9607(a), and who are therefore liable pursuant to 42 U.S.C. § 9613(f) for their equitable share of any past, present, and future response costs and natural resource damages established in the prosecution of their claims against Cargill.

14. Although other grounds also refute Plaintiffs' claims that Cargill is jointly liable, including (but not limited to) the requirement of specific causation for natural resource damages,

Plaintiffs' status as liable parties in particular renders Cargill's share of any past, present, or future response costs and natural resource damages, if any, several only and not joint.

15. Cargill is further entitled to a declaration that Plaintiffs shall be liable for their allocable share of all future response costs and natural resource damages, if any.

WHEREFORE, Cargill asserts that if the Court finds that Cargill is liable pursuant to 42 U.S.C. § 9607(a), then judgment should be entered against Plaintiffs granting Cargill the following relief:

- a. A declaration that Plaintiffs are liable to Cargill pursuant to 42 U.S.C. §§ 9607(a) and 9613(f), and that they shall bear their allocable share of any past, present, and future response costs and natural resource damages, including any recoverable costs incurred in complying with any injunction, should Cargill be found liable for any such costs or damages or subject to any such injunction, as well as an award of such costs and damages, as appropriate;
- b. A declaration that Cargill's share of liability for past, present, and future response costs and natural resource damages, if any, is several, and that Cargill shall bear no more than its equitable share of any such liability; and
- c. An award of Cargill's attorney's fees and costs, together with any other relief the Court deems just and appropriate.

## **COUNT II CONTRIBUTION UNDER OKLAHOMA LAW**

16. Cargill realleges and incorporates herein the foregoing allegations of this Counterclaim, and further alleges as follows:

17. As set forth above, Plaintiffs constitute persons who are liable under 42 U.S.C. § 9607(a), and who are therefore liable to Cargill pursuant to 42 U.S.C. § 9613(f) for their

equitable share of any past, present, and future response costs and natural resource damages established in the prosecution of their claims against Cargill. Plaintiffs' status as liable parties in particular renders Cargill's share of any past, present, or future response costs and natural resource damages, if any, several only and not joint.

18. Title 12 of Oklahoma Statutes § 832 provides that "[w]hen two or more persons become jointly or severally liable in tort for the same injury to person or property ..., there is a right of contribution among them even though judgment has not been recovered against all or any of them ..."

19. "Contribution" under 42 U.S.C. § 113(f) is defined as the common law tortfeasor's "right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault."

20. To whatever extent Cargill is unable to collect the full proportionate and equitable share of any costs or damages from Plaintiffs through 42 U.S.C. § 9613(f), Cargill is entitled to invoke 12 Okla. Stat. § 832 to recover its outstanding contribution amounts, if any.

WHEREFORE, Cargill asserts that if the Court finds that Cargill is liable pursuant to 42 U.S.C. § 9607(a), then judgment should be entered against Plaintiffs granting Cargill the following relief:

- a. A declaration that Plaintiffs are liable to Cargill pursuant to 12 Okla. Stat. § 832, and that they shall bear their allocable share of any past, present, and future response costs and natural resource damages, including any recoverable costs incurred in complying with any injunction, should Cargill be found liable for any such costs or damages or subject to any such injunction, as well as an award of such costs and damages, as appropriate;

- b. A declaration that Cargill's share of liability for past, present, and future response costs and natural resource damages, if any, is several, and that Cargill shall bear no more than its equitable share of any such liability; and
- c. An award of Cargill's attorney's fees and costs, together with any other relief the Court deems just and appropriate.

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Rhodes, Hieronymus, Jones, Tucker & Gable,  
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### CERTIFICATE OF SERVICE

I certify that on the 10<sup>TH</sup> day of January, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:



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s/ John H. Tucker